

REMARKS

Claims 1-22 are pending in the application, and were each rejected. Reconsideration of the claims is respectfully requested.

I. CLAIM REJECTIONS -- 35 U.S.C. § 101

Claims 16-22 were rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

To expedite allowance of this application, the specification is amended above to accommodate the Examiner's concerns. As such, the rejection is believed moot and is traversed.

Accordingly, the Applicant respectfully requests the Examiner to withdraw the § 101 rejection.

CLAIM REJECTIONS -- 35 U.S.C. §103

Claims 1-22 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,675,803 to *Preisler, et al.*, hereinafter "Preisler". This rejection is respectfully traversed.

Applicant initially notes that these claims are only rejected over Preisler. The Examiner concedes that Preisler does not teach or suggest the limitations of the claims, and so fails to make a *prima facie* rejection.

The Examiner does also discuss "Buban," which is assumed to be the reference indicated on the PTO-892 form, and so Applicant will also address that reference, below.

In *ex parte* examination of patent applications, the Patent Office bears the burden of establishing a *prima facie* case of obviousness. MPEP § 2142, p. 2100-133 (8th ed. rev. 4, October

2005). Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. *Id.* To establish a *prima facie* case of obviousness, three basic criteria must be met: *Id.* First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. *Id.* Second, there must be a reasonable expectation of success. *Id.* Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *Id.* The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *Id.*

Preisler does not teach or suggest the claimed first, second, and third program code. Preisler appears disclose an original program 302 and an in-memory copy 308, the "instrumented program". The in-memory program 308 can be patched during execution to become the instrumented program.

Assuming, *arguendo*, that Preisler's original program 203 corresponds to the claimed first program code, and the Preisler's patched instrumented program corresponds to the claimed second program code, it is clear the nothing in Preisler corresponds to the claimed third program code, as conceded by the Examiner, wherein one of the modified program components (of the second program code) is replaced with a corresponding one of the verified program components (of the first program code).

The Examiner refers to Preisler's col. 5, lines 20-25:

This in-memory copy of the program 302 changes to a patched program, called "instrumented program" herein. The patches are applied only to this in-memory copy 308 of the program 302 and not to the original program 302 stored on disk 301.

As can be seen, there is no teaching or suggestion that any modified program component (i.e., the patches) of the instrumented program are replaced with a corresponding one of any program components of program 302, as required by claims 1, 9, and 16. Preisler therefore cannot teach or suggest all limitations of the claims, and does not anticipate the claims.

The rejections of all independent claims are therefore traversed, and so the rejections of the corresponding dependent claims are likewise traversed.

The Examiner also discusses a “Buban” reference, assumed to be US 2004/0107416 to Buban *et al.* The Examiner refers in particular to paragraph 0009:

[0009] Briefly, the present invention provides a system and method for updating software components on a running computer system without requiring any interruption of service. To this end, a software component is hotpatched, with a new version of a routine loaded into memory and an instruction in the original routine changed to jump to the new patch routine. The last instruction of the patch routine returns the flow of execution back to the appropriate point, e.g., to the caller of the original function. After hotpatching, subsequent execution of the routine by calling applications or other code causes a jump to the patch code, while applications that were in the middle of a call to the routine, before the patch was applied, continue executing as if the patch was not made. To provide hotpatching, an installer loads a binary image of the patch to apply to a routine, identifies the appropriate component and routine to which the patch is to be applied, and changes the targeted routine to jump to the patched version.

This passage appears to teach that a new version of a program is loaded into memory, and program routines then jump, when appropriate, to the new code for execution. As can be seen, there is no replacement of any code, so there is no teaching that “one of the modified program components is replaced with a corresponding one of the verified program components”, as required by claim 1.

There is further no teaching in this passage of creating a third program code corresponding to the second program code (as the Examiner designates the “second program code” in Preisler). Even more specifically, there is no teaching of a data processing system having means for creating such code, in the context of claim 9, or instructions for creating such code, in the context of claim 16 – while there is no discussion of how code is generated, it does not appear to be in any way generated by the system or software.

Accordingly, the Applicant respectfully requests the Examiner to withdraw the § 103 rejection with respect to these claims. The Examiner is cordially requested to telephone the undersigned to resolve any issues remaining before allowance.

CONCLUSION

As a result of the foregoing, the Applicant asserts that the remaining Claims in the Application are in condition for allowance, and respectfully requests an early allowance of such Claims.

If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at *manderson@munckbutrus.com*.

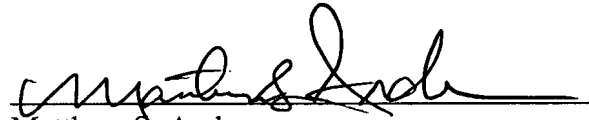
The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

MUNCK BUTRUS P.C.

Date: _____

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